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No. 85-2058

In the Supreme Court of the United States

October Term, 1985

WILLIAM ELIZEY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Whether the State presented sufficient evidence to establish each element of the crimes charged beyond a reasonable doubt.

2. Whether a trial court may interrogate witnesses in an impartial manner.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review the instant matter.

The questions herein presented were raised in the Ohio Court of Appeals of Cuyahoga County, and the Supreme Court of Ohio.

The Ohio Court of Appeals, Eighth District, unanimously affirmed the petitioner's conviction. Likewise, the Supreme Court of Ohio overruled Petitioner's Motion for Leave to Appeal and further denied Petitioner's Motion for Rehearing.

The Ohio Courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court.

No substantial federal question is presented by the instant Petition for Certiorari.

HISTORY OF THE CASE

On July 26, 1983, Petitioner, William Elizey, was charged in a five count indictment with Grand Theft, in violation of Ohio Revised Code Section 2913.02; Forgery (two counts) and Uttering (two counts), in violation of Ohio Revised Code Section 2913.31. At the close of the State's case, the court granted Petitioner's motion for a directed verdict of acquittal as to one count of Forgery and one count of Uttering. On July 3, 1984, the jury found the petitioner not guilty of Forgery, but guilty of Grand Theft and Uttering. Elizey's co-defendant, Lawrence Williams, was found guilty by the same jury of Grand Theft, Forgery, and Uttering. On August 13, 1984, Elizey was sentenced to three concurrent terms of six months imprisonment.

STATEMENT OF THE FACTS

The Grand Theft alleged a scheme in which Petitioner aided and abetted co-defendant Lawrence Williams ("Williams") in obtaining $13,103 belonging to Elizey's employer, Picker International Corporation ("Picker"). Petitioner was employed by Picker as a senior buyer from June of 1980 to February, 1983. Picker was under contract with the University of California at San Francisco to construct and install a digital angiography room in the Radiology Department of Moffit Hospital. One item of equipment required in the digital angiography room was a Model 401 4-Channel Ultrasonic Dimension System ("401"). In August of 1981, Petitioner, in his position as senior buyer, ordered a 401 from Schuessler and Associates of Cardiff By The Sea, California. Petitioner bought it at a cost of $3,540 to Picker. It was delivered to Moffit Hospital and is still being used there. On November 24, 1981, Petitioner issued Picker purchase order No. B 84117 to Spectrum Instrument Company, a company owned by co-defendant Lawrence Williams, for a second 401. Petitioner met Williams in 1980 when he was looking to buy a house in Cleveland. Williams, who is also a real estate agent, assisted him in finding a place to live. It was only after Williams met Elizey that his company, Spectrum Electronics, began to do business with Picker. Spectrum did between $50,000 and $75,000 worth of business with Picker in 1981 and 1982, and in 1983 did about $80,000 worth. Williams' main contact with Picker was Petitioner. The purchase order shows that the second 401 was requisitioned by John Volpe on Requisition No. 33486; that the unit price for the item was $12,465; and that

it was to be shipped to Moffit Hospital, Radiology Department, University of California at San Francisco. Volpe testified that he never requisitioned a second 401. Jane Quentin, Administrator of the Radiology Department, testified that a second 401 was neither ordered nor received by the Radiology Department. Spectrum Instruments was paid $13,103 for the phantom 401. A search of the records at Picker revealed that requisition form No. 33486 was still in the requisition book, unused. Petitioner, in addition to his testimony that the second 401 was requisitioned by Volpe, testified that he was told by Dr. Michael Tesic of Picker that Dr. Margolis of Moffit Hospital wanted a back-up 401 in case the one purchased from Schuessler failed to perform. Tesic denied any such conversation and denied that a back-up 401 was ever envisioned or required by the contract.

The Uttering conviction involved an invoice from Spectrum on which co-defendant Williams forged the writing of another without his consent. Petitioner was alleged to have aided and abetted Williams in the uttering of this forged document. Williams wrote on a copy of the original invoice from Spectrum the following words: "Received on 4/6/82 Dr. Lionel Davidson". No doctor with that name was ever employed or associated with Moffit Hospital. With this forged writing to back him up, Petitioner wrote on the original invoice from Spectrum the following words, "Okay to pay". This was done on May 3, 1982, and on June 2, 1982, Picker issued the check for $13,103 to Spectrum. The check was endorsed and negotiated by Williams.

REASONS FOR DENYING THE WRIT

1. The State presented sufficient evidence to establish each element of the crimes charged beyond a reasonable doubt.

Petitioner's first two claimed errors involve the same issue and can be discussed together.

> A reviewing court will not reverse a jury verdict where there is substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St. 2d 169.

We are not to weigh the evidence or to attempt to assess the credibility of the witnesses. The jury has already done this. We are to review the record and determine whether there is substantial evidence, regardless of who produced it, to support the jury's verdict.

We must also keep in mind the dictates of *State v. Kulig* (1974), 37 Ohio St. 2d 157. *Kulig* held that where a conviction was supported solely by circumstantial evidence that the evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.

A review of the record finds the jury verdict to be supported by substantial circumstantial evidence. Moreover, this Court will not involve itself with factual issues.

2. A trial court may interrogate witnesses in an impartial manner.

Petitioner argues that the trial court's questioning of witnesses constitutes prejudicial error. Rule 614(B) of the Ohio Rules of Evidence provides:

> The court may interrogate witnesses in an impartial manner, whether called by itself or by a party.

Clearly, the court is authorized to question witnesses, provided that it is done in an impartial manner. If counsel believes that the court is not conducting the interrogation in an impartial manner, or that the interrogation in some way violates the defendant's right to due process, Rule 614(C) provides counsel with a method of objecting to the court's interrogation of witnesses. It relaxes the usual procedure for making objections and allows counsel to wait until the "next available opportunity when the jury is not present". Petitioner's alleged error must fail for two reasons: First of all, counsel did not avail himself of the unique opportunity offered him by Rule 614(C) and failed to object to the court's questioning of the witnesses. Secondly, his failure to object is immaterial because the court's interrogation was conducted in an impartial manner and could have been of assistance to the jury in understanding testimony which, at times, was complicated and highly technical. In this case, we believe the trial judge should be commended, not condemned, for his determination in attempting to get to the truth of the matter.

CONCLUSION

The Respondent, State of Ohio, submits that the Petition herein fails to present any question of constitutional dimension justifying review by the Court. The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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